



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Don & Roy's Cycle Shop, Inc., et al. Vs.
Kawasaki Motors Corp., U.S.A.

Case No. TR-99-0047

FINAL DECISION

On December 15, 1999, Don & Roy's Cycle Shop, Inc., filed a complaint pursuant to Wis. Stat. § 218.01(3)(f)1, [now numbered Wis. Stat. § 218.0116(7)(a)1] protesting the establishment of a new dealer of the same line make within its relevant market area. By letter dated December 15, 1999, the Complainant also demanded mediation pursuant to Wis. Stat. § 218.01(7m), (now numbered Wis. Stat. § 218.0136). On December 16, 1999, an Order Suspending Proceedings was issued suspending proceedings in the above-captioned matter. By letter dated March 20, 2000, the parties advised the Administrative Law Judge that a mediation meeting had occurred and was not successful. Pursuant to the notification of the parties that mediation has occurred, the Order Suspending Proceedings was lifted.

Pursuant to Wis. Stat. § 218.0116(7), and upon due notice, the Division of Hearings and Appeals held a hearing on March 12, 13, and 14, 2001, in Madison, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The parties filed post-hearing briefs. The complainant filed its initial brief on April 19, 2001; the respondent filed its response brief on April 30, 2001; and, the complainant filed its reply brief on May 11, 2001.

In accordance with Wis. Stat. §§ 227.42 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Don & Roy's Cycle Shop, Inc., complainant, by

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The Administrative Law Judge issued a proposed decision on June 18, 2001. The Complainant and the Respondent filed comments on the Proposed Decision on July 5, 2001. Having received the submissions of the parties and the record in this matter, I hereby adopt the Proposed Decision of the Administrative Law Judge as the Final Decision in this matter.

APPLICABLE LAW

Wis. Stat. § 218.0116(7)(a)1, provides in relevant part:

A manufacturer ... who seeks to enter into a franchise agreement establishing ... a motor vehicle dealership ... within the relevant market area of an existing enfranchised dealer of the line make of motor vehicle shall first notify in writing the [D]epartment [of Transportation] and each such existing enfranchised dealer of its intention to establish or relocate a dealership or outlet. Within 30 days of receiving the notice or within 30 days after the end of any appeal procedure provided by the manufacturer ... whichever is later, any existing enfranchised dealer of the same line make to whom the manufacturer, importer or distributor is required to give notice under this subdivision may file with the department and the division of hearing and appeals a complaint protesting the proposed establishment or relocation of the dealership or outlet within the relevant market area of the existing enfranchised dealer. If a complaint is filed, the department shall inform the manufacturer, importer or distributor or that a timely complaint has been filed, that a hearing is required, and that the proposed franchise agreement may not be entered into until the division of hearings and appeals has held a hearing, nor thereafter, if the division of hearings and appeals determines that there is good cause for not permitting the proposed establishment or relocation of the dealership or outlet. In the event of multiple complaints, hearings shall be consolidated to expedite the disposition of the issue.

Wis. Stat. § 218.0116(7)(b), provides:

In determining whether good cause exists for not permitting the proposed establishment or location of a dealership or outlet, the division of hearings and appeals shall take into consideration the existing circumstances, including, but not limited to:

1. The amount of business transacted by existing enfranchised dealers of the line make of motor vehicle when compared with the amount of business available to them.
2. The permanency of the investment necessarily made and the obligations incurred by existing enfranchised dealers in the performance of their franchise agreements.
3. The effect on the retail motor vehicle business in the relevant market area.
4. Whether it is injurious to the public welfare for the proposed dealership or outlet to be established or relocated.
5. Whether the establishment or relocation of the proposed dealership or outlet would increase competition and therefore be in the public interest.
6. Whether the existing enfranchised dealers of the line make of motor vehicle are providing adequate consumer care for the motor vehicles of that line make, including the adequacy of motor vehicle service facilities, equipment, supply of parts and qualified personnel.
7. Whether the existing enfranchised dealers of the line make of motor vehicle are receiving vehicles and parts in quantities promised by the manufacturer, factory branch or distributor and on which promised quantities existing enfranchised dealers based their investment and scope of operations.
8. The effect the denial of such establishment or relocation would have on the license applicant, dealer or outlet operator who is seeking to establish or relocate a dealership or outlet.

Wis. Stat. § 218.0101(30), provides:

“Relevant market area” means of the area within a 10-mile radius of the site of an existing enfranchised motor vehicle dealership or the area of sales responsibility assigned to the existing enfranchised dealership by the manufacturer, factory branch or distributor, whichever is greater.

FINDINGS OF FACT

The Administrator finds:

1. Don & Roy's Cycle Shop, Inc. (Don & Roy's) is a licensed motorcycle dealership doing business at 17740 W. Bluemound Road, Brookfield Wisconsin. It was established in 1972 in New Berlin and moved to its current facilities in 1982. Don & Roy's holds franchises to sell Kawasaki, Honda, and Yamaha motorcycles. It also sells other recreational products including ATVs, snowmobiles and jet skis. Don & Roy's employs approximately thirty persons in the spring and summer and approximately twenty during the fall and winter. Its current facilities are located in the eastern part of Waukesha County, approximately two miles west of the Milwaukee County line.

2. Kawasaki Motors Corp., U.S.A. (Kawasaki) is a licensed distributor of motorcycles under Wisconsin law. Kawasaki distributes motorcycles and other products, including ATVs, utility vehicles and watercraft, through a network of franchised dealers. Kawasaki and Don & Roy's have had a franchise relationship since 1985. Pursuant to its Sales and Service Agreement with Kawasaki, Don & Roy's area of sales responsibility for Kawasaki motorcycles is a five-mile radius from its facilities.

3. The counties of Milwaukee, Waukesha, Washington and Ozaukee make up what is known as the Milwaukee Standard Metropolitan Statistical Area (Milwaukee SMSA). Kawasaki has four motorcycle dealers located in the Milwaukee SMSA (Don & Roy's, Southeast Sales, Sportland 2, and Midcities Motorsports). In 1998, Kawasaki established another Kawasaki motorcycle dealer, Kickback Jack's, in Wind Lake, Wisconsin. Kickback Jack's location is in Racine County, which is outside the Milwaukee SMSA, but it is located just one mile from the Waukesha County line.

4. Midwest Power Equipment, Inc. (Midwest Power) is a retail business located at 2510 West Sunset Drive, Waukesha, Wisconsin. Midwest Power began selling lawn and garden power equipment. In September 1998, Midwest Power was appointed as a Kawasaki ATV and mule dealer. It is now seeking to add a Kawasaki motorcycle franchise to its facilities. Tom

Falcone, the owner of Midwest Power, is a motorcycle enthusiast and a dynamic salesman. His facility is well organized and has more than adequate space to add Kawasaki motorcycles to its product lines. Midwest Power would be an attractive dealer for Kawasaki motorcycles.

5. Kawasaki alleges that it needs additional representation in the Milwaukee SMSA because its share of the motorcycle market in the Milwaukee SMSA, and particularly in Waukesha County, is below its national market share. Midwest Power's facilities are located approximately ten miles from Don & Roy's by highway and 6.5 miles by straight-line distance (Testimony of Robert Van Zelst). Since Midwest Power is located within Don & Roy's relevant market area for purposes of Wis. Stat. § 218.0116(7), Kawasaki was required to give Don & Roy's notice of Kawasaki's intent to establish Midwest Power as a Kawasaki dealer. Don & Roy's filed a timely complaint under Wis. Stat. § 218.0116(7), which is the subject of this proceeding.

6. Although the last two years have been peak years for the motorcycle industry, the existing Kawasaki dealers in the Milwaukee SMSA who testified at the hearing reported profits below the industry average (Ex. 33).

7. Kawasaki, Honda, Yamaha, Suzuki, and Harley-Davidson are the major motorcycle brands sold in the United States. Kawasaki, Honda, Yamaha, and Suzuki are manufactured by Japanese-based companies. Harley-Davidson is the only major brand of motorcycle manufactured in the United States. Harley-Davidson has five facilities employing 3162 persons in Milwaukee and Waukesha Counties (Ex. 16). Loyalty to the Harley-Davidson brand is high in the Milwaukee SMSA. Additionally, Harley-Davidson has in place an employee purchase plan which allows employees of Harley-Davidson and certain family members to purchase a Harley-Davidson motor cycle at a reduced price. For these reasons Harley-Davidson enjoys a much larger market share in the Milwaukee SMSA than it has nationally.

8. If Harley-Davidson motorcycle sales are removed from the calculation and Kawasaki's market share is only compared with other Japanese brands of motorcycles, Kawasaki's market share in the Milwaukee SMSA is comparable to its national market share. Kawasaki's share of the motorcycle market calculated with and without including Harley-Davidson are as follows:

KAWASAKI MARKET SHARES

National

	1999	2000
Including Harley-Davidson	12.7% (Ex. 66)	11.2% (Ex. 66)
Without Harley-Davidson	17.5% (Ex. 66)	15.1% (Ex 66)

Milwaukee SMSA

	1999	2000
Including Harley-Davidson	8.45% (Ex. 62)	6.26% (Ex. 61)
Without Harley-Davidson	21.5% (Ex. 62)	18.1% (Ex. 62)

Relevant Market Area (10 mile radius from Don & Roy's Cycle Shop)

	1999	2000
Including Harley-Davidson	7.4% (Ex. 60)	Not Available
Without Harley-Davidson	19.3% (Ex. 53)	Not Available

Waukesha County

	1999	2000
Including Harley-Davidson	6.45% (Ex. 62)	4.45% (Ex. 61)
Without Harley-Davidson	17.9% (Ex. 62)	12.3% (Ex. 62)

These tables show that Kawasaki's market share decreased in Waukesha County and the Milwaukee SMSA from 1999 to 2000. However, Kawasaki's market share also decreased nationally. When Harley-Davidson is removed from the calculation, Kawasaki's market share in the Milwaukee area is comparable to its national market share. The existing Kawasaki dealers in the Milwaukee SMSA are transacting the amount of business available to them.

9. There is no evidence in the record that the public is not being adequately served by the existing franchise Kawasaki dealer's in the Milwaukee SMSA or are paying higher prices than they would be expected in a competitive market.

10. There is no evidence in the record that the existing franchise dealers are not receiving an adequate supply of product and parts from Kawasaki. The existing franchise dealers are receiving product and parts from Kawasaki in the amount promised them.

11. Denying the establishment of Midwest Power as a Kawasaki dealer will constitute a lost business opportunity to Midwest Power. However, there surely are other franchises or businesses Midwest Power can market from its facility. The denial of the establishment of Midwest Power as a Kawasaki dealer will have a significantly adverse impact on its business.

12. Assuming Midwest Power would sell a reasonable number of Kawasaki motorcycles if it were established as a Kawasaki dealer, a significant portion of those sales will come at the expense of existing dealers. Kawasaki has minimum facility requirements for its metro dealers (Ex. 56). The existing dealers have made significant investments in their facilities as required by Kawasaki in order to sell and service Kawasaki motorcycles. A significant loss of sales to Midwest Power will unreasonably jeopardize the investment made by one or more of the existing franchised Kawasaki dealers in the Milwaukee SMSA.

DISCUSSION

Wis. Stat. § 218.0116(7), gives the Division of Hearings and Appeals (DHA) responsibility to determine whether good cause exists for not permitting the establishment of an additional dealer within the relevant market area of an existing enfranchised dealer. The legislative intent underlying Wis. Stat. § 218.0116(7), is to protect the investment of existing motor vehicle dealers against unfair actions of manufacturers while maintaining healthy competition in the market. The statute lists eight factors for the DHA to consider in determining whether good cause exists for not permitting the establishment of the proposed dealership. The considerations that the parties are disputing in this case are whether the existing enfranchised dealers are transacting the amount of business available to them and whether the establishment of an additional Kawasaki motorcycle dealer in the Milwaukee SMSA will increase competition in the market and, therefore, be in the public interest.

The methodology for determining whether the existing enfranchised dealers are transacting the amount of business available to them is to compare the market share of the subject brand of motorcycle in the relevant market area to that brand's market share nationally or in other comparable markets. In the instant case, Kawasaki's market share in the Milwaukee SMSA is below its national market share. However, market shares for the various major brands of motorcycles in the Milwaukee SMSA are skewed by the strong presence of Harley-Davidson in this market. If the impact of Harley-Davidson is removed, Kawasaki's market share in the Milwaukee SMSA is comparable to its national market share. The number of Kawasaki motorcycles sold in the Milwaukee SMSA, and particularly Waukesha County, in recent years is

disappointing to Kawasaki.¹ However, Kawasaki's market share has declined nationally since 1998. There is no apparent reason to expect the existing Kawasaki dealers in the Milwaukee SMSA to counter this trend. The existing enfranchised dealers are adequately capturing the amount of business available to them.

Another factor that must be considered in determining whether good cause exists to permit the establishment of an additional dealer in the market is whether the establishment of the proposed dealer will increase competition in the market. An additional dealer will increase competition in the Milwaukee SMSA. Increased competition is beneficial to the public. However, larger volume dealers enjoy economies of scale and achieve lower costs per unit. Assuming sufficient competition, economies of scale for dealers will be passed along as lower prices to customers. The optimal balance is to have a sufficient number of dealers in a market so that there is strong competition but not too many dealers so that the dealers enjoy economies of scale and have lower costs. A measure used to determine whether healthy competition exists in a particular market is whether consumers are receiving adequate service for their motorcycles and are being charged competitive prices for motorcycles and serve to those motorcycles. There is no evidence in the record that the existing Kawasaki dealers are able to charge greater than competitive prices for Kawasaki motorcycles or that they are not providing adequate service to Kawasaki owners.

The Wisconsin legislature enacted Wis. Stat. § 218.0101 *et seq.*, in recognition of the gross disparity of bargaining power between motor vehicle manufacturers and dealers. The purpose of these statutes is to furnish dealers some protection against unfair treatment by manufacturers. *Forest Home Dodge, Inc., v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965). One of the purposes of Wis. Stat. § 218.0116(7), is to protect the investments of existing enfranchised dealers from being jeopardized by unfair actions on the part of manufacturers, such as establishing an excessive number of additional dealers in a market. Kawasaki argues that in the instant case the injection of an energetic, new dealer will increase the number of Kawasaki motorcycles sold in the Milwaukee SMSA and that Midwest Power can be a successful Kawasaki dealer without necessarily taking sales away from the existing Kawasaki dealers. Although, undoubtedly one can increase sales by better, more efficient marketing, the assertion that Midwest Power can be a successful Kawasaki dealer without adversely impacting any of the existing Kawasaki dealers in the Milwaukee SMSA is self-serving speculation. Without evidence to the contrary one must assume that a significant number of any Kawasaki motorcycle sales made by Midwest Power will be at the expense of the existing Kawasaki dealers.² A

¹ Kawasaki blames Don & Roy's for its low market share in Waukesha County. However, because of its location near the Milwaukee County line, a significant portion of Don & Roy's area of sales responsibility is in Milwaukee County and the majority of Waukesha County is outside of Don & Roy's area of sales responsibility.

² Kawasaki witnesses testified that the introduction of a new dealer increases sales in an area. However, no statistical evidence was cited to support this statement. To the contrary, Kickback Jacks was established as a Kawasaki dealer in this area in 1998 and the number of Kawasaki motorcycles sold and Kawasaki's market share in the area actually decreased from 1999 to 2000.

significant loss of sales by the existing Kawasaki dealers will jeopardize the investment of one or more of those dealers.

As stated in the Findings of Fact, Midwest Power would clearly be an attractive addition to the Kawasaki dealer network in the Milwaukee SMSA. However, there does not appear to be justification to allow an additional Kawasaki dealer in the relevant market area at this time. Adding a Kawasaki motorcycle franchise to his existing business is a logical step for Midwest Power. However, he undoubtedly has other alternatives for his facility. Alternatively, if Midwest Power is committed to becoming a Kawasaki motorcycle dealer, Mr. Falcone could explore the possibility of purchasing an existing Kawasaki franchise and relocating it to his facility. It is unfair to the existing franchise dealers to allow Kawasaki to add an additional dealer in the relevant market area that would jeopardize their investment and may result in their business becoming unprofitable through no fault of the dealers.

Through this process, Kawasaki is apparently attempting to establish a new, more attractive dealer at the expense of one of its older, possibly marginal dealers in the Milwaukee SMSA. Although this transitioning of dealers is reasonable and makes business sense for Kawasaki, the statute was enacted in large part to protect the investments made by existing franchised dealers. If Kawasaki strongly supports the establishment of Midwest Power as a Kawasaki motorcycle dealer, it should encourage Midwest Power to purchase one of the existing franchises. This would allow that dealer to realize a reasonable return on the investment the dealer has made over time and protect the remaining existing dealers from over-dealing in the Milwaukee SMSA.

Finally, although two of Kawasaki's core arguments can not be proved or disproved based on the evidence in the record, these arguments fly directly into the face of the assumptions underlying Wis. Stat. § 218.0116(7), and must be rejected. Firstly, Kawasaki alleges that the retail motorcycle market is dynamic, not static and that Midwest Power can make sales at the expense of competitor's brands of motorcycles, not other Kawasaki dealers. Kawasaki argues that the number of dealers in an area "drives" the number of motorcycles sold in that area. However, implicit in Wis. Stat. § 218.0116(7), is the assumption that the number of dealers in an area should be determined by the amount of business available in a particular market. If one assumed that the establishment of an additional dealer in an area would result in a corresponding increase in sales in that area, there never would be good cause to deny the establishment of an additional dealer. Without credible evidence that potential sales exist in an area that are not being captured by the existing dealers, one must assume that most of the sales made by a new dealer will come at the expense of the existing dealers in the area. The first question that must be

answered is whether the transfer of those sales from the existing dealers to the proposed dealer will adversely impact the existing dealers or result in more competition in the market.³

The other argument made by Kawasaki that flies into the face of the assumptions underlying Wis. Stat. § 218.0116(7), is the application of Christaller's Central Place Theory. As described by Kawasaki's expert, Dr. Lois Smith, Christaller's Central Place Theory provides that the more retailers for a particular product that exist in an area, the more customers for that product will travel to that geographic area. Dr. Smith argued that the establishment of Midwest Power as a Kawasaki dealer near Don & Roy's will attract more motorcycle customers to the area surrounding Don & Roy's. The attraction of more customers will lead to an increase in Kawasaki's market share and result in more sales by Don & Roy's. Christaller's Central Place Theory is generally applicable to the retail motor vehicle industry as evidenced by the development of "auto rows," strips where dealerships for various manufacturers locate in the same proximity.

Motor vehicle manufacturers want to have representation in auto rows, because customers are attracted to these areas due to the ease of comparison shopping. However, an assumption underlying the relevant market area law is that it may be unfair to existing dealers to allow the establishment of another dealer of the same line-make within the existing dealer's relevant market area. If one applied Christaller's Central Place Theory in the manner suggested by Dr. Smith, one would want to encourage the establishment of additional dealers of the same line-make within existing dealers relevant market area. Without attempting to critique the application of Christaller's Central Place Theory to retail motorcycle markets, clearly Dr. Smith's application of the theory is inconsistent with the Wisconsin's legislature's assumptions in enacting Wis. Stat. § 218.0116(7).

CONCLUSIONS OF LAW

The Administrator concludes:

1. Good cause exists for denying the establishment of Midwest Power as a Kawasaki dealer within the relevant market area of Don & Roy's Cycle Shop, Inc.
2. Pursuant to Wis. Stat. § 218.0116(7)(a)1, the Division of Hearings and Appeals has the authority to issue the following order.

³ As discussed above, an issue that must also be addressed is whether the existing dealers are capturing the amount of business available to them. In its brief Kawasaki argues both that the existing dealers are not capturing the amount of business available to them as shown by the below national market share in the area and that Midwest Power will be able to generate additional sales that would not have been available to the existing dealers. The finding made is that the existing dealers are capturing the business available to them and that Kawasaki has not shown that Midwest Power would generate sufficient additional sales to avoid adversely impacting the investment of one or more existing dealers.

ORDER

The Administrator orders:

Kawasaki Motors Corp., U.S.A. shall not enter into the proposed franchise agreement with Midwest Power Equipment, Inc.

Dated at Madison, Wisconsin on August 15, 2001.

STATE OF WISCONSIN
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By _____
DAVID H. SCHWARZ
ADMINISTRATOR

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NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.